IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2952 of 1999

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE B.C.PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

---

BATLIBOI & CO LTD.

Versus

SALES TAX OFFICER (1) CLASS-1, DIVISION 1

---

Appearance:
MR IM KAPUR for Petitioners
M/S MG DOSHIT & CO for Respondent No. 1, 2, 3, 4

---

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE B.C.PATEL

Date of decision: 10/04/2000

CAV JUDGEMENT (per D.M.Dharamadhikari, CJ)

The petitioner Batliboi & Co. Ltd. is a `dealer' registered under the provisions of Gujarat Sales

Tax Act, 1969 (shortly referred to as "State Act").

2. By this petition under Article 226 of the Constitution of India, it assails orders of provisional assessment orders cumulatively marked as Annexure A (15) (1 to 8) for assessment years between 1.10.1988 to 30.9.1992 passed by Sales Tax Officer No.1 Class-2 Division-1, Surat in purported exercises of powers under Section 41 (B) of the State Act.

3. The petitioner company in assailing the impugned orders of provisional assessment resulting in imposition of tax, interest and penalty on it for the different assessment years raises a question of the validity of the provisions contained in Section 47 (4A) (b) of the State Act, whereunder the Assessing Officers are empowered to levy simple interest at the fixed rate of 24% p.a. on the quantum of tax remainig unpaid on assessment or reassessment.

4. The relevant facts in brief leading to the passing of the impugned orders of provisional assessment are as under:-

5. Admittedly, one of the business activities of the petitioner company is to manufacture air conditioning package units. The petitioner company has its factory at Udhna. For the assessment years in question it had transacted business of erection of air conditioner units within the State of Gujarat, outside the State and in the course of inter-state trade & commerce.

6. The case of the petitioner company is that air conditioning package units are manufactured according to the specification of its customers. The company has several branches in the country including one at Ahmedabad and one at Calcutta. The case of the company is that air conditioning package units manufactured by it at its factory at Udhna are dispatched by it to its branches at Ahmedabad and/or Calcutta by way of branch transfers. Such supply of air conditioning package units, according to the petitioner company to the customers outside the State were not sales but were inter-state works contracts and and therefore not liable to Sales Tax under the State Act or the Central Sales Tax Act.

7. While the assessment proceedings under the State Act were pending, the respondent Sales Tax Authority in exercise of powers under Section 59 of the State Act

searched the business premises of the company on 3.12.96 and its Books of Accounts were seized. In the seizure effected on 3.12.96, the Sales Tax Officer, Surat, as been stated in his order, found the following defects:

> "1. The dealer is taking works contract as per Transfer Advice No. 77509 dated 26.12.95, stock transfer to Bombay branch is shown at Rs.2,85,780/- but the delivery challan No. 2083 dated 26.12.95 attached therewith on verification it was found that the goods have been sent to Reliance Industries Limited, Hazira, Surat. It could not be shown that the tax has been paid on such transactions. These goods have been manufactured by the factory here."

8. After impounding the Accounts Books in purported exercise of powers of Section 59(3) & (4) of the State Act, the Sales Tax Officer passed the impugned orders of provisional assessments. In its reply to the show cause notices issued for provisional assessments, the case of the petitioner company was that the branch transfers from State of Gujarat to destinations outside the State were inter-state works contracts and were not exigible to tax under the State Act. It was contended that such inter-state works contracts cannot also be subjected to tax under the Central Sales Tax Act as the definition of "sale" in the Central Sales Tax Act has not been amended after introduction of clause 29(A) in Article 366 of the Constitution of India by Constitution (46th amendment) Act, 1982 correspondingly with the definition of "sale" as amended in the State Act by Gujarat Act no.14 of 1985 w.e.f. 5.8.1985.

9. The Assessing Officer in the impugned orders of assessment has rejected the contention advanced on behalf of the petitioner company stating that:-

> "The dealer is not paying tax by considering the transactions as works contract of the branch and as such transactions have been decided to be exigible to tax under the Local and the Central Acts, it was decided to assess under section 41B of the Gujarat Sales Tax Act by issuing notice in form No. 36 for protecting the State Revenue. The other transactions are to be assessed under section 41(3) and the transactions assessed under section 41B are to be allowed as deduction at the time of assessment under that section."

[The above quoted portion is English translation from the order in Gujarati.]

10. The Assessing Officer thus treating branch transfers as Sales in the course of inter-state works contract provisionally assessed the petitioner and imposed on it tax, interest and penalty in different amounts for the different periods in question.

11. The Learned Senior Counsel Shri Kazi appearing for the petitioner company challenges the impugned orders of provisional assessments and raises question of vires of Section 47 (4A) (B) of the State Act. The main ground urged is that in absence of any amendment to the definition of `Sale' in the Central Sales Tax Act after introduction of definition clause 29-A in Article 366 of the Constitution, the Assessing Authority could not have subjected inter-state works contract to tax treating them as inter-state sales merely because after insertion of clause 29(A) in Article 366 of the Constitution, definition of `sale' in the State Act was substituted by Gujarat Act No. 14 of 1985 w.e.f from 5.8.1985. It is submitted that taking reasonable view of existing law the authority treated the inter-state works contract as not exigible to tax as they could not be termed as inter-state sales. The company therefore, had not paid tax on its branch transfers. It could legitimately take such a view of its non-liability of tax in view of the 2 full bench decisions of Punjab & Haryana High Court in the case of East India Cotton Manufacturing Co. Ltd. V. State of Haryana - [1993] 90 STC 221 and Thomson Press India Ltd. V. State of Haryana & Anr, [1996] 100 STC 416.

12. We find that on the contention raised on behalf of the petitioner company, the Supreme Court decisions in Builders Association of India & Ors. Vs. Union of India, 1989 Vol.2 SCC 645 and M/s. Gannon Dunkerley & Co. & Ors. Vs. State of Rajasthan and Ors, 1993 Vol.1 SCC 364 also throw a floodlight.

13. The next contention advanced on behalf of the petitioner company to assail the said provisional assessment orders is that on the facts and legal position stated above, it was not a case where the Assessing Officer could have any `reason to believe that the dealer has evaded tax' and therefore he could not have taken resort to the provisions of Section 41(B) of the said Act for provisionally assessing the petitioner to tax, interest and penalty for the assessment periods in

question.

14. The Learned Counsel for the petitioner also raised questions of bar of limitation under Section 42 of the State Act in assessing the petitioner and validity of the provision of Section 47(4A) (b) of the Act conferring, as contended by him, arbitrary and unguided powers on the Assessing Authority to levy interest at a fixed rate of 24% on the tax remaining unpaid to the extent indicated in the said provision.

15. We have also heard Ld. AGP Mr. S.K.Patel appearing for the Sales Tax Department who in his submissions made an attempt to support the impugned orders of provisional assessments. It is contended that the branch transfers were in the nature of inter-state sales and not inter-state works contract as is submitted on behalf of the petitioner.

16. After hearing the Learned Counsel for the petitioner and the Tax Authorities, in our considered opinion, the petition deserves to succeed on the short ground that there did not exist any facts, circumstances or grounds for the Assessing Authority to invoke the power of making provisional assessment under Section 41(B) of the State Act. For the aforesaid reason, which we would shortly elaborate, We do not consider it necessary to decide the other legal and constitutional issues raised on behalf of the petitioner company, we grant the company liberty to raise all such grounds in its regular assessments pending under Section 41 of the State Act.

17. Section 41(B() providing for provisional assessment reads as under:-

"41B - Provisional Assessment

(1) Where the Commissioner has reason to believe that the dealer has evaded the tax, he may, after taking into account all relevant materials gathered by him and after giving the dealer a reasonable opportunity of being heard, provisionally assess to the best of his judgement the amount of tax payable by the dealer.

(2) The provisions of this Act shall mutatis mutandis apply to the provisional assessment as if provisional assessment were an assessment made under the Act."

(Underlining to invite pointed attention and for emphasis)

18. A bare perusal of the above quoted provision would go to show that resort to provisional assessment can be made by the Commissioner or his delegate as Assessing Authority only if "has reason to believe that a dealer has evaded the tax."

19. Neither in its show cause notice issued prior to making a provisional assessment nor in the assessment orders, the Assessing Authority has recorded reasons or grounds for coming to the conclusion that dealer has evaded the tax. As has been mentioned above in the order affecting the seizure of its Account Books, the Assessing Authority found that certain work contracts were liable to be taxed under the Central Sales Tax Act which were in the nature of branch transfers. In the orders of assessment, the Assessing Authority has reproduced the stand taken on behalf of the assessee that `such branch transfers were made for completing the works in accordance with the orders and specification of customers outside the State and were not sales but were merely transactions in the course of works contract.' The Assessing Officer has also in the order of assessment, rejected the contention advanced on behalf of the petitioner that the branch transfers were inter-state works contract and not inter-state sales. He held them exigible to tax under the Central Act. It is on taking such view of law that the Assessing Officer provisionally assessed the petitioners and consequently imposed tax, interest and penalty on it for different assessment periods under consideration. On the facts and legal position disclosed by the dealer, we do find that there existed any grounds and circumstances for the Assessing Officer to reasonably form an opinion "that the dealer has evaded the tax". Such formation of opinion is pre-condition for invoking the power of provisional assessment under Section 41-B of the Act. In its affidavit in reply to the petition, the impugned order and provisional assessments are sought to be supported by stating thus

"as a very large amount of tax was involved and regular assessment of the petitioner was likely to take time, I decided to make provisional assessment."

20. From the portion quoted above, it is amply clear

that at no point of time the Assessing Officer had any reason to believe that the dealer has evaded the tax. The expression "evasion of tax" conveys mensrea on the part of the dealer. The expression conveys a meaning that the dealer by infringing the law has been trying to avoid payment of tax in due time.

21. We seek some support in taking the aforesaid view of the provisions of Section 41-B of the Act from the Division Bench decision of this Court in Natraj Rubber & Anrs. Vs. Sales Tax Officer, Bhavnagar [1999] 113 STC 575, where the similar word "evasion" used in Section 62 of the Act was construed denoting "some overt or covert act on the part of the dealer in furtherance of avoiding or to evade the tax."

22. The petitioner company has contended before the Department that all its branch transfers outside the State were transfers in the nature of inter-state work contracts and in absence of the amendment of the definition of `sale' in the Central Sales Tax Act, after introduction of Clause 29(A) in Article 366 of the Constitution, such inter-state indivisible work contracts were not taxable under the Central Sales Tax Act. The petitioner company thus had not paid tax on such inter-state works contract under a bonafide belief and a view of law taken by it on the basis of 2 full bench decisions of the Punjab and Haryana High Court (Supra).

23. For the reasons aforesaid, we are of the opinion that this was not a case where the Assessing Officer could have resorted to the provisions under Section 41B of the Act for provisional assessment of the petitioner and imposition of tax penalty and interest.

24. We are not at all impressed by the preliminary objections raised on behalf of the department that the Assessee having preferred appeals against the provisional assessment orders, this Court should decline to interfere in the case. As has been stated on behalf of the petitioner company, the appeals have been filed but the appeals have not been admitted and no orders by interim relief have been passed because the petitioner company has not paid the full amount of tax which is a pre-condition in law for filing appeals. As the alternative remedy of appeal on payment of full tax is an onerous remedy, this Court cannot refuse to exercise its discretion in giving relief under Article 226 of the Constitution of India. We rely on the decision of Supreme Court in Paradip Port Trust Vs. Sales Tax Officer, Cuttack & Ors. in [1999] 114 STC Page 178.

25. Consequent to the discussions aforesaid, the petition succeeds & is allowed. All the impugned orders cumulatively marked as Annexure A-15 (1 to 8) are hereby quashed with liberty to the respondents as Authorities of the Sales Tax Department of the State of Gujarat to assess the petitioner by regular assessment under Section 41 of the State Act. We also grant liberty to the petitioner to raise all other grounds and contentions, which have been raised before us in the assessment proceedings. The petition is accordingly disposed of. The petitioner shall be entitled to costs of the petition Counsel Fees Rs.5000/- if precertified. Rule made absolute.

****

jitu